Sahara Nissan, Inc., d/b/a Jack Biegger Nissan *and* Liberated Workers Welfare Union. Case 31–CA–17074

October 11, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On September 20, 1989, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] We agree with the judge that the General Counsel has failed to demonstrate that the parties' negotiations reached impasse. The General Counsel's limited exceptions appear to contend that once the judge posited the possibility that the parties had not reached agreement because no meeting of the minds had occurred, he should have concluded that the parties were at impasse. On the facts of this case, we cannot agree. Whether the parties in fact reached agreement or, as the General Counsel contends, failed to do so, it is clear from the testimony and from other evidence of the negotiators' conduct at the February 10 meeting that both parties ended the session evincing the belief that they had negotiated an agreement. While their respective beliefs may have been mistaken ones, they are inconsistent with a finding of impasse. Thus, despite the Respondent's contention that it never yielded to the Union on the management-rights clause, we cannot conclude from the evidence that the Respondent's insistence on the clause rendered further bargaining futile. Similarly, the record facts concerning the Respondent's overall bargaining strategy do not yield evidence of an intent to forestall agreement with the Union sufficient to outweigh the Respondent's apparent willingness to come to an agreement with the Union. Accordingly, we do not conclude that the Respondent engaged in surface bargaining.

Bernard T. Hopkins, Esq., for the General Counsel.
Norman Kirshman, Esq. (Kirsh and Harris), of Las Vegas, Nevada, for the Respondent.
Steven Geller, President, Liberated Workers Welfare Union, Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Liberated Workers Welfare Union (Charging Party or Union) filed a charge against Sahara Nissan, Inc. d/b/a Jack Biegger Nissan (Respondent or Company) on March 30, 1988. The charge alleges that the Company engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA or Act).

Based on that charge, the Regional Director for Region 31 of the National Labor Relations Board (NLRB or Board) issued a complaint and notice of hearing before an administrative law judge alleging that the Respondent had failed to bargain in good faith with the Union.

Respondent filed a timely answer to the complaint denying that it had engaged in the unfair labor practices alleged. Respondent's answer further alleges two affirmative defenses explained more fully below.

I heard this matter on October 12, 1988, at Las Vegas, Nevada. Having now carefully reviewed the record, considered the credibility of the witnesses who appeared before me and studied the posthearing briefs filed on behalf of the General Counsel and the Respondent, I conclude that the General Counsel failed to prove that Respondent engaged in the unfair labor practices alleged based on the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Pleading*

The gravamen of the complaint is that Respondent refused to bargain with the Union—the representative of Respondent's new- and used-car salespersons—as the NLRB ordered by insisting to impasse between January 18 and February 29, 1988, on the inclusion in any collective agreement of an overly broad management-rights clause. In particular, the General Counsel asserts that the disputed clause included a provision reserving to management the right to unilaterally modify the contractual wage and commission provisions.

In addition the complaint alleges that Respondent, by its overall conduct in negotiations including its insistence on the overly broad management-rights provision, failed to bargain in good faith with the Union.

Respondent denies the specific allegations of the complaint. As an affirmative defense, Respondent alleges that it concluded an agreement with the Union on February 10 which precludes any conclusion that the parties arrived at an impasse. Further, Respondent alleges that it had no legal obligation to bargain with the Union because of the degree of participation in negotiations by Mark Darata, the Union's secretary-treasurer, in contravention of the Board's Decision and Order in *Sahara Datsun*, 278 NLRB 1044 (1986).[1]

B. *Background*

Respondent, a Nevada corporation, is engaged in the retail sale and leasing of motor vehicles from its principal place of business in Las Vegas.[2]

The Union, an unaffiliated labor organization with 12 members at the time of this hearing, commenced an effort to organize Respondent's new- and used-car salespersons in 1984.[3] That effort led to litigation described more fully

[1] Respondent's previous name was Sahara Datsun, Inc. The transcript is corrected at p. 9, L. 24, to change the word ''formally'' to ''formerly.''

[2] Respondent annually derives gross revenues in excess of $500,000 from its retail operations and has direct inflow exceeding $50,000. As Respondent meets the Board's retail standard for asserting jurisdiction, I find that it would effectuate the purposes of the Act for the Board to exercise that jurisdiction here to resolve this labor dispute.

[3] Respondent's answer denies that the Union is a labor organization in the previous Board case involving these parties, the Union was found to be a labor

Continued

below and the Union's status as the bargaining representative of Respondent's vehicle sales staff.

The prior case cited above—officially noticed in this proceeding—reflects that in September 1984, the Union filed a petition for a representation election among the Respondent's new and used car salespersons. An NLRB election in November 1984 resulted in six votes for, and six votes against, representation with four determinative challenged ballots.

Subsequently, the representation issues were consolidated with several pending unfair labor practice cases for hearing before Administrative Law Judge Gerald Wacknov. Judge Wacknov concluded in that consolidated proceeding that Respondent engaged in a variety of serious unfair labor practices, including the unlawful discharge of Darata 2 days after filing the representation petition. Judge Wacknov further concluded that the unfair labor practices were meritorious objections to the election.

On the basis of his findings, Judge Wacknov overruled the challenge to the ballot of Darata. However, he sustained the remaining challenges and entered a recommended Order providing that the Union should be certified if it achieved a majority from the counting of Darata's ballot.

Judge Wacknov's recommended Order further provided that, in the event the Union failed to receive a majority after counting Darata's ballot, the representation case should be dismissed and that the Respondent should be ordered to bargain with the Union pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 579 (1969), and its progeny. This provisional order was grounded on Judge Wacknov's conclusion that Respondent's unfair labor practices were sufficiently egregious and pervasive to undermine the majority standing enjoyed by the Union on September 13, 1984, and to preclude holding a fair second election.

Having concluded that Respondent should be required to bargain with the Union by one means or the other, Judge Wacknov nonetheless concluded that Respondent should not be required to deal with Darata as a representative of the Union due to misconduct on Darata's part following his discharge. Judge Wacknov, however, rejected Respondent's contention that Darata's misconduct was sufficiently serious to preclude his reinstatement as an employee of the Respondent .

Respondent excepted to Judge Wacknov's conclusion concerning Darata's fitness for reinstatement. The Board concluded that Darata's misconduct did preclude his reinstatement as an employee as of October 19, 1984, which made him ineligible to participate in the November 1984 representation election. Accordingly, the Board sustained the challenge to Darata's ballot and issued the *Gissel* bargaining order forthwith. The Board further noted ''that the Respondent should not be required to meet and negotiate with Darata, and we affirm the judge's conclusion that Darata is not entitled to act as a union representative.''[4]

The Board's order was subsequently enforced by the court of appeals on March 3, 1987. *Sahara Datsun v. NLRB*, 811 F.2d 1317 (9th Cir. 1987).

C. *Overview of the Negotiations*

Following the judgment of the court of appeals, the parties commenced negotiations for a collective-bargaining agreement on April 21, 1987. Thereafter, 14 additional meetings were held. Specifically, in 1987 other sessions occurred on May 8 and 29; June 11, 12, and 25; July 9 and 30; August 7 and 20; and September 30. In 1988, bargaining meetings occurred on January 13 and 27, and the final session was held on February 10.

From April 21, 1987, through July 30, the Respondent's principal negotiator was Howard Silver, an associate in Attorney Kirshman's office. Attorney Kirshman acted as Respondent's principal negotiator in all remaining sessions. Commencing with the August 20 session, Kirshman retained Mary Whitely, an employee of the Southern Nevada Employers Association, to take bargaining notes on Respondent's behalf. All of Whitely's typed notes appear in the joint exhibits.

The Union's principal negotiator was Steven Geller, its president. Geller was present for all sessions except on July 30. Martin Russell, a union steward for Respondent's salespersons, actively participated in all sessions following that held on May 8.

Although Darata did not participate directly in negotiating sessions, it is conceded that he prepared many of the Union's written proposals and frequently caucused with the union negotiators following the bargaining sessions. In addition, Darata prepared and circulated a newsletter to unit employees concerning the status of negotiations and the personalities at the bargaining table. Darata also participated in a meeting to review the proposed contract submitted by Respondent following the February 10 meeting.[5]

A Federal mediator participated in all the sessions commencing with the July 30, 1987 meeting.

The Respondent's method of compensating its salespersons was one of the central issues in the negotiations. When bargaining commenced, unit employees' gross pay was determined by the sum of three items, i.e., hourly wages based on the statutory minimum of $3.35 per hour; a 25-percent commission from the profit received for each vehicle sold by the salesperson, and a bonus payment for the sale of a prescribed number of units or above.

Throughout the negotiations, Respondent, which imports the bulk of its inventory from Japan, insisted on continued flexibility in its commission and bonus system to meet a variety of exigencies. Specifically, Respondent argued that the fluctuating exchange rate between United States and Japanese currency made its costs unpredictable. In addition, Re-

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organization within the meaning of the Act Moreover, the evidence in this case establishes that it is an organization in which employees participate and which exists in part to bargain with employers concerning wages, hours, and working conditions Accordingly, I find the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[4] As justification for this conclusion the Board found that Darata, on October 19, 1984, had made unsubstantiated assertions to an official of a bank through which Respondent obtains financing for its customers that Respondent's managers were allegedly submitting falsified customer credit applications. In addition, the Board found that on January 25, 1985, Darata published a newsletter accusing the Respondent's owners of involvement in prostitution and the sale of cocaine. At this hearing, Respondent's counsel testified without contradiction that Darata had been convicted of a misdemeanor assault on two of Respondent's officials.

[5] In its brief, Respondent asserts that the Union submitted the proposed agreement for ratification. Although Geller alluded to a ratification meeting, he later explained that this meeting was among Darata, Darata's mother who performed clerical work for the Union, Russell, and himself. By the time the meeting occurred, none of these individuals were employed by Respondent. There is no evidence that the agreement was ever submitted to unit employees for their consideration or approval.

spondent occasionally increases sales commissions to provide incentives in connection with special promotions by the manufacturer or to move ''old iron,'' i.e., vehicles which have been in inventory for long periods.

At the May 8 bargaining session, the Respondent submitted a package of contract proposals covering several noneconomic items. To maintain the flexibility it desired in setting commissions and bonuses, Respondent included broad management-rights language which, Respondent concedes, allowed management to unilaterally alter the commission and bonus system applicable to unit employees at any time. The provision did not apply to the hourly wage rate.

The Union likewise submitted several noneconomic proposals at the May 8 meeting. Their proposals included a vastly restricted management-rights provision (which clearly would not have permitted any alteration of a contractual compensation system), separate provisions limiting or barring conduct included in the scope of Respondent's management-rights proposal, a comprehensive grievance-arbitration provision, and a dues-checkoff provision.

In the sessions which immediately followed the May 8 meeting, the parties reviewed and debated the various proposals on the table. In sum, the Respondent rejected nearly all the significant union proposals and introduced an economic proposal which called for maintaining the existing compensation package.

At or prior to the August 20 meeting, Respondent submitted a comprehensive draft agreement labeled as its ''Last, Best and Final Proposal.'' Although modified somewhat from its May 8 proposal, this draft agreement retained the management-rights clause permitting the Respondent to unilaterally alter the contractual commission and bonus scheme.

In addition, Respondent's August 20 proposal provided for a grievance procedure without an arbitration provision. Instead, Respondent's proposed provision relieved the Union of the contractual no-strike commitment in the event a grievance was not satisfactorily resolved at the final step of the proposed grievance procedure.

No provision was made in Respondent's August 20 proposal for any form of dues checkoff.

Prompted by the editor, the parties went through Respondent's August 20 proposal and initialed those provision on which there was tentative agreement No agreement was recorded on Respondent's management-rights proposal.

Thereafter, at least a portion of the August 20 meeting related to the method of computing commissions. Because this process involves minute and complex detail concerning the cost of a vehicle to Respondent unfamiliar to Kirshman, he apparently agreed to make Barbara Askin, Respondent's business manager, available at the following session to respond to the Union's inquiries.[6]

In the course of the September 30 meeting and the union negotiators' exchanges with Askin, the Union made a request for extensive unit cost information on the 47 or so models of vehicles the Respondent offers for sale. Respondent agreed to furnish the information which it estimated would take 4 to 6 weeks to compile.[7] Although the Union requested that negotiations continue in the meantime, Respondent declined to do so.

The requested information was provided to Geller on December 9, and, subsequently January 13, 1988, was mutually fixed as the date for resuming negotiations.

At the sessions on January 13 and 27, most of the time appears to have been consumed with further detailed exchanges between the union negotiators and Askin concerning the cost information provided, methods of computing specific commissions, and the Union's proposal for increasing the commission to 27 percent or changing the commission structure to provide for a 20-percent commission on the difference between the sale price and the actual unit cost without the $300 pack. Respondent rejected both union proposals to change the existing commission and bonus system arguing that it was adequate to attract a qualified sales staff and, hence, any increase was economically unjustified.

Some attention was focused at these two sessions on the Union's demand that the grievance system provide for arbitration as a final step.[8] Kirshman continued to reject an arbitration provision as he had consistently done in the past. Then, as always, Kirshman's position was grounded on Respondent's alleged fear that Darata would promote a flood of grievances with the potential for many costly arbitration proceedings.

In addition, the Union continued to request a dues-checkoff provision. That too was rejected on the ground that the Respondent was unwilling to perform any service for the Union and on the further ground that the Union was not sufficiently responsible financially to indemnify the Respondent for any liability it might incur in connection with deducting dues from employee pay.

Both Geller and Russell claim that during the January 13 meeting, Kirshman agreed to delete the objectionable clause in Respondent's management-rights proposal which permitted Respondent to unilaterally alter the commission and bonus structure notwithstanding the collective-bargaining agreement. Kirshman emphatically denies that he ever agreed to do so. To the contrary, Kirshman asserts that he repeatedly reminded the Union's negotiators that its August 20 proposal, if accepted by the Union, would provide no guarantee that the commission and bonus structure provided would remain the same.

At the conclusion of the January 27 meeting, the parties agreed to meet again on February 10 In preparation for the February meeting, Kirshman addressed a letter to Geller dated February 5 which modified the August 20 proposal slightly to include language concerning health insurance and the recognized but unpaid holidays. The letter further notes agreement on the subject of Christmas and weekly bonuses.

Otherwise, Kirshman's February 5 letter withdrew Respondent's proposal for the verification of invoices used to compute commissions which the Union previously rejected

[6] As proposed by Respondent, sales employees were to be paid a commission which amounted to 25 percent of the amount between the sale price of a unit (vehicle) and the actual cost of the unit plus a $300 ''pack.'' A ''pack'' is essentially dealer preparation expenses. Much of the discussion appears to have focused on how the actual cost of a unit was computed and whether sales employees could gain access to that information.

[7] According to Askin, she and the Respondent's parts manager spent approximately 140 hours in the ensuing weeks compiling the cost information requested by the Union.

[8] The Union's last proposal provided for a permanent arbitration panel consisting of the Respondent's owner, another management official, and two union designated attorneys. Kirshman rejected the proposal after the union negotiators refused to disclose the names of the attorneys they intended to designate as panel members.

and details at length Respondent's reasons for rejecting the Union's dues-checkoff proposal.

The February 5 letter is silent with respect to any understanding about modifying the management-rights proposal as claimed by Geller and Russell. The letter concludes by advising that Respondent had made all the movement it intended to make and that the union negotiators should come to the February 10 meeting prepared to ''fish or cut bait.''

The February 10 meeting began with some bickering over the language of the commission and bonus plan. Whitely's contemporaneous notes suggest that the mediator interjected himself to obtain answers to questions posed by the union negotiators. After Kirshman asserted that Respondent intended to make no further changes in its position and would commence implementing its offers to the Union if not accepted by February 13, 1988, the union negotiators caucused. When the union negotiators returned, the Respondent's outstanding contract offer—according to the testimony of Geller, Russell, and Kirshman as well as the notes of Whitely—was accepted.

The union negotiators requested that an agreement be signed immediately before the February 10 meeting adjourned. Kirshman protested. The mediator instructed Kirshman to draft a final agreement and forward a copy to the Union and himself after which he planned to schedule one further meeting to review the actual contract language and take care of all discrepancies Kirshman agreed to prepare the document within 2 weeks.

Kirshman transmitted his version of the final agreement by letter dated February 29 to the Union, to the mediator, and to an NLRB agent in the Las Vegas Resident Office. Among other things, Kirshman's letter invited written comments concerning the draft. The Union claims that it did not receive the letter containing the final agreement until the last week of March.[9]

After reviewing the agreement transmitted by Kirshman, the Union filed the instant charge.[10] There is no evidence that any Union official expressed any dissatisfaction with the agreement as drafted to either Kirshman or the mediator.

D. *Further Findings and Conclusions*

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer ''to refuse to bargain collectively with the representative of his employees.'' The obligation to bargain collectively, as defined in Section 8(d) of the Act, requires of an employer and the employee representative that they ''meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any guestion arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party,'' The mutual duty to bargain collectively ''does not compel either party to agree to a proposal or require the making of a concession.''

The General Counsel claims Respondent did not live up to its duty under Section 8(a)(5) because it insisted to impasse on the inclusion in any agreement of the provision in the management-rights clause permitting it to, among other things, unilaterally change the contractual ''wage and commission provisions.'' In addition, the General Counsel alleges that this other conduct by Respondent was tantamount to surface bargaining, i.e., merely going through bargaining motions with no real intention of reaching an agreement.

In support, General Counsel correctly asserts that the management-rights clause here is not unlike that in *Tomco Communications*, 220 NLRB 636 (1975). In that case, the Board found that the employer had engaged in surface bargaining by proposing and rigidly adhering to contract proposals which were predictably unacceptable because they called for the union there to abandon significant statutory rights and duties as the bargaining representative.

At the hearing, the General Counsel specifically eschewed any legal theory grounded on a conclusion that an agreement was reached in these negotiations which either party was compelled to execute under *H. J. Heinz v. NLRB*, 311 U.S. 514 (1941).

Respondent claims that the General Counsel's position lacks merit because an agreement was reached which precludes finding that an impasse occurred. Moreover, Respondent asserts that it fulfilled its statutory duty inasmuch as it met for a number of meetings, explained the basis for its proposals in great detail, provided the Union with extensive information and made certain concessions requested by the Union.

I find that the General Counsel's case lacks merit. The fact that no impasse occurred precludes a finding that Respondent violated Section 8(a)(5) of the Act without a basis for finding that Respondent's proposals produced a bargaining deadlock or were illegal on their face, any conclusion here that Respondent violated Section 8(a)(5) would come perilously close to placing the Board in the role of judging good bargains and bad bargains.

In *Hi-Way Billboards*, 206 NLRB 22, 23 (1973), the Board characterized an impasse in the following manner:

> A genuine impasse in negotiations is synonymous with a deadlock the parties have discussed a subject or subjects in good faith, and, despite their best effort to achieve agreement with respect to such, neither party is willing to move from its respective position.

None of the witnesses on either side of this case describe a deadlock situation Rather, both sides agree that on February 10, an agreement was reached. In view of this evidence, the General Counsel's impasse theory is imprisoned by logic.

Thus, by believing the Union's claim that the agreement transmitted on February 29 failed to accurately reflect the accord everyone says was reached because it continued the objectionable language on commissions and bonuses, and thereby implicitly, if not explicitly, disbelieving Kirshman's claim to the contrary, a finding of an agreement on the Union's terms would be in order.

On the other hand, if Kirshman is believed to the extent that he claims he never agreed to delete the language, and the Union's claim to the contrary is thereby implicitly or ex-

[9] Throughout negotiations the Union repeatedly claimed that it did not receive letters and proposals from Kirshman and Kirshman complained to the Union about undated letters

[10] A similar charge was apparently filed on February 24 after the Union failed to receive the agreement as promised by Kirshman. Counsel for the General Counsel represented that this earlier charge was withdrawn on March 25 because the Union was not in a position to present its supporting evidence in a timely fashion.

plicitly disbelieved, Respondent too should expect a finding that an agreement occurred on its terms.

In either of the above situations, finding that an impasse existed would be unreasonable and irrational. Instead, the case would be controlled by *Heinz* and one party or the other could demand the execution of an agreement. But the General Counsel—for whatever reason—does not rely on a *Heinz* theory and I am not at liberty to find a violation on that basis.

If, however, neither side is discredited, then the best that can be found is a mutual misunderstanding concerning their agreement because there was no meeting of minds on the terms of the management-rights clause. But a misunderstanding does not rise to the level of an impasse.

And where, as here, both sides claim an agreement was reached, the claim that one side or the other engaged in surface bargaining becomes untenable. If surface bargaining implies that one party is going through the motions of bargaining with no real intention of reaching an agreement, it is, in my judgment, impossible to reconcile any assertion, as both sides do here, that an agreement was reached.

For these reasons, I will recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove that Respondent violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.